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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

NO. 234

HENRY J. CZOSEK, *et al.*,
Petitioners,

v.

JOHN R. O'MARA, GEORGE McCORMICK, JULIUS PACKARD, WALTER DALY, and ERIE LACKAWANNA RAILROAD COMPANY,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (A. 21-29) is reported at 407 F. (2d) 674. The decision and order of the District Court (A. 17-20) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered February 24, 1969. (A. 30-31.) Rehearing was denied by the Court of Appeals March 18, 1969. (A. 32.) The petition for a writ of certiorari was filed June 13, 1969, and was granted October 13, 1969. The jurisdiction of this Court rests on Title 28, United States Code, Section 1245 (1).

STATUTES INVOLVED

The statutory provisions principally involved are Sections 3 First (i), (j) and (m) of the Railway Labor Act (45 U. S. C., Sec. 153 First (i), (j) and (m)):

> "Section 3. First . . . .
>
> "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.
>
> "(j) Parties may be heard either in

person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

• • •

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute. In case a dispute arises involving an interpretation of the award the division of the Board upon request of either party shall interpret the award in the light of the dispute."

QUESTIONS PRESENTED

1. May an action for damages brought by railroad employees against their employer for alleged wrongful discharge, and against their union and its representatives for failure to process their claims against the railroad, be dismissed as to the railroad on the ground of exclusive jurisdiction in the National Railroad Adjustment Board, but continue to be maintained as a "fair representation" case against the union and recovery sought solely from it, where the damages claimed stem from the alleged wrongful discharge by the employer in breach of the collective bargaining agreement, independent of any conduct by the Union?

2. May railroad employees maintain an action against their union for failure to process their grievances without exhausting their administrative remedies, when there is no showing that it would have been futile for them to do so, and no claim is made that they could not personally press their rights under the collective bargaining agreement and before the National Railroad Adjustment Board?

3. Is a proper claim for violation of a union's duty of fair representation stated by a complaint which fails to allege any facts which would constitute hostile discrimination by the union, or furnish any basis from which such hostile discrimination could reasonably be inferred?

STATEMENT OF THE CASE

This case is before the Court to review a judgment of the Court of Appeals below (A. 30-31) affirming in part, and reversing in part, the decision and order of the District Court (A. 17-20) dismissing the complaint. The effect of this ruling was to permit the plaintiffs, respondents here, to maintain an "unfair representation" suit against their collective bargaining representatives, the petitioners [1] while relegating them to their statutory administrative remedy before the National Railroad Adjustment Board for pursuit of their claims against petitioners' co-defendant, plaintiffs' employer, for the alleged wrong-

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[1] The petitioners are Henry J. Czosek, Henry J. Czosek as Chairman, Local Lodge 826 of the International Brotherhood of Firemen and Oilers, Local No. 826, Edward P. McEntee, System Federation No. 78, and System Federation No. 100. The International Brotherhood of Firemen and Oilers, listed as one of the defendants-appellees in the caption of the proceedings below, was not served with summons and did not appear in the courts below.

ful discharge out of which the unfair representation charges arose.

The action was instituted by four employees of the Erie Lackawanna Railroad Company (named as a respondent herein along with the four employee plaintiffs) who alleged (Complaint, A. 4-7) that they were furloughed from their positions as stationary engineers in June of 1962, and replaced by employees of the former Erie Railroad, as a result of the merger of the former Delaware, Lackawanna and Western Railroad Company and the Erie into the present company, and that they received no compensation from respondent Railroad Company for their loss of employment. It was alleged that this constituted a violation of the Interstate Commerce Act and the "Implementing Agreement" between the Railroad Company and its employees, and that the Railroad Company violated the Railway Labor Act by failing to give plaintiffs 30 days' advance notice of a change in working conditions. In addition it was alleged that the treatment of which plaintiffs complained constituted a wrongful discharge, and the complaint purported to predicate jurisdiction on diversity of citizenship and jurisdictional amount as well as on the fact that the action was claimed to arise under the Interstate Commerce Act and the Railway Labor Act.

The only charge asserted against defendants other than the Railroad Company was that they failed to process claims on behalf of plaintiffs to remedy the asserted wrongful acts of the Railroad Company, and it was said that this amounted to hostile discrimination and a violation of the terms of "the collective bargaining agreement." [*] (Complaint, paras. Eleventh and Twelfth, A. 6-7.)

[*] No provisions of the agreement are pleaded, either verbatim or in substance.

Motions to dismiss the complaint, for lack of jurisdiction of the subject matter and failure to state a claim upon which relief could be granted, were filed by respondent Railroad Company (A. 10-11) and by petitioners (A. 8-9), and sustained by the District Court. With respect to the claim against the union defendants (petitioners), the District Court said:

> "Although the plaintiffs use the phrase 'hostile discrimination' in asserting that the defendants arbitrarily and capriciously failed to process their claims, use of that phrase alone does not bring their claim within the rationale of *Steele v. Louisville & Nashville R. R. Co.*, 323 U. S. 192 (1944). No attack is directed at the validity of the collective bargaining agreement and no claim is made that these plaintiffs could not personally press their rights under the collective bargaining agreement. *Cf. Ferro v. Railway Express Agency, Inc.*, 296 F. 2d 847 (2d Cir. 1961)." (A.20.)

The District Court further found that there was no basis for federal jurisdiction alleged in the complaint. The jurisdictional allegations were (1) that there was diversity of citizenship and more than $10,000.00 in controversy (Complaint, para. First, A. 4); that the action arose under the Interstate Commerce Act, 49 U. S. C., Sec. 5 et seq (Complaint, para. Second, A. 5); and that the action arose under the Railway Labor Act, 45 U. S. C., Sec. 151 et seq. (Complaint, para. Third, A. 5). The court found that diversity of citizenship clearly was lacking as among the parties; and that insofar as the action purported to be brought under the Railway Labor Act, even

if asserted as an action for damages for wrongful discharge, it was barred by plaintiff's failure to exhaust administrative remedies, since such exhaustion was required by applicable New York State law.

Plaintiffs did not file or seek leave to file an amended complaint but instead appealed from the decision of the District Court.

In its opinion (A. 21-29) the Court of Appeals held that the complaint was sufficient to state a federal claim against petitioners for breach of the duty of fair representation. As to respondent Railroad Company, however, dismissal of the complaint was affirmed both on the ground of exclusive primary jurisdiction of the National Railroad Adjustment Board over plaintiffs' claim of wrongful discharge (A. 24), and the absence of any allegations showing a basis for maintaining the actions under the Interstate Commerce Act (A. 25-26).

The Court of Appeals further held that on remand plaintiffs should be granted leave to amend their complaint to state a cause of action against the Railroad Company, but that in order to do so they would have to show joint discrimination of the company with the union, that is, a combined attempt to discriminate. Absent such amendment of the complaint, the decision of the Court of Appeals leaves the plaintiffs free to pursue the independent remedies of a court action for damages against the union, and a claim filed with the National Railroad Adjustment Board against the Railroad Company based on its alleged breach of the collective bargaining agreement.

SUMMARY OF ARGUMENT

1. The complaint fails to state a claim against petitioners for unfair representation, and was properly dis-

missed by the District Court. Aside from purely conclusory statements, it does not allege the necessary elements of a claim for unfair representation, as delineated in this Court's opinion in *Vaca* v. *Sipes*, 386 U. S. 171 (1967). Here the only charge asserted against the union defendants was a failure to process grievances on plaintiffs' behalf. This is not sufficient to show unfair representation. Plaintiffs must show in addition that the grievances were meritorious; that the conduct of the union defendants in failing to process them was arbitrary, discriminatory, or in bad faith; and that they either exhausted their administrative remedies or were prevented from doing so.

In this case the complaint fails to allege any facts which would constitute discrimination, arbitrary action, or bad faith on the part of the union defendants, or furnish any basis from which such improper conduct could reasonably be inferred. It does not allege any attempt by plaintiffs to exhaust administrative remedies, nor make any claim that they could not personally press their grievances under the applicable collective bargaining agreement and before the National Railroad Adjustment Board. There is no allegation of any inadequacy of such administrative remedies.

2. The judgment of the Court of Appeals improperly permits plaintiff-respondents to seek recovery from petitioners for damages occasioned solely by respondent Railroad Company's alleged breach of contract and wrongful discharge. It further would permit plaintiffs to pursue their claims simultaneously before two different tribunals, with the possibility of conflicting results or even double recovery for a single wrong. In these respects the ruling below is in direct conflict with the principles enunciated in *Vaca* v. *Sipes, supra.*

3. The decision below would seriously disrupt collective bargaining and the statutory procedures for handling grievances in the railroad industry. Its practical effect would be to compel unions to process all employee grievances, regardless of their merit, placing an unsupportable burden on the statutory administrative procedures for handling such matters, or in the alternative to abandon this area of collective bargaining to individual handling. And the processing of employee breach of contract claims both in the courts and before the National Railroad Adjustment Board would be completely destructive of uniformity of contract interpretation in the railroad industry.

ARGUMENT

I. The complaint fails to state a claim against petitioners for unfair representation.

(a) *Absence of allegations of bad faith, arbitrary action, or hostile discrimination.*

In the recent case of *Vaca* v. *Sipes*, 386 U. S. 171 (1967), this Court had occasion to discuss at length the necessary elements which are required to establish a breach by a union of its duty of fair representation of the members of the collective bargaining unit, in connection with grievances or breach of contract claims which they might have against their employer. In its opinion in that case the Court emphasized that merely showing that the grievance was meritorious and that the union refused to handle it is not sufficient. In addition the employee must show that there was bad faith, arbitrary conduct, or hostile discrimination on the part of the union. (386 U. S., pp. 188-195.)

Even tested by the very liberal standards of federal notice pleading, the complaint in this case clearly fails to state

a claim against the union for violation of its duty of fair representation. Beyond claiming that the union refused to process their grievance, plaintiffs have alleged no facts which would even support an inference of bad faith, arbitrary conduct or hostile discrimination on the part of the union defendants. The complaint merely states the bald conclusion that the failure of petitioners to process claims against the Railroad Company amounted to "gross nonfeasance and hostile discrimination", and an unspecified violation of the terms of "the collective bargaining agreement." (Complaint, paras. Eleventh and Twelfth, A. 6-7.)

The insufficiency of the complaint with respect to the fair representation claim against the union was in fact recognized by the Court of Appeals. In the portion of its opinion dealing with this aspect of the case, it states:

> "The complaint does not make clear the basic reason why plaintiffs are aggrieved . . ." (A. 27; 407 F. (2d), p. 679.)

At the hearing before the Court of Appeals, counsel for plaintiff sought to cure the inadequacy of the complaint by arguing orally, completely *extra* the record, that the union's refusal to handle the grievance was motivated by political considerations. In discussing this contention the Court of Appeals again pointed up the inadequacy of the complaint, saying:

> ". . . we do not think that this basis of the claim can be fairly inferred from the face of the complaint . . ." (A. 28; 407 F. (2d), p. 679.)

Nevertheless, the court below proceeded to ignore the acknowledged insufficiency of the complaint, and attempted to justify reversal of its dismissal by the District Court on the grounds that the defendants might have developed

the nature of plaintiffs' unstated claim by discovery, and that "a plaintiff should be given the opportunity to file supplemental pleadings." (A. 28; 407 F. (2d), p. 679.) But plaintiffs neither sought nor were denied an opportunity to amend their complaint;[*] and we submit that defendants should not be compelled to cure the deficiencies in a complaint which they are entitled to have dismissed under Rule 12 (b) of the Federal Rules of Civil Procedure.

The decision below sharply conflicts with those of other Courts of Appeals on the question of the sufficiency of allegations of bad faith or hostile discrimination in a fair representation case. In *Balowski* v. *International U., United A., A. & A., Imp. Wkrs.*, 372 F. (2d) 829, the Court of Appeals for the Sixth Circuit said:

> "The allegations of a complaint alleging the breach of a Union's duty of fair representation must contain more than 'conclusory statements alleging discrimination. In particular plaintiffs must make a showing that the action or inaction of the statutory representative complained of was motivated by bad faith, for the gravamen of the rule is "hostile discrimination".' Gainey v. Brotherhood of Railway Employees, 313 F. 2d 318, 323 (C. A. 3). '[C]onclusory words * * * without a concomitant showing a lack of good faith [does] not set forth a claim.' Hardcastle v. Western Greyhound Lines, 303 F.

[*] Plaintiffs in fact elected to stand on their complaint as originally filed, and in an affidavit of their counsel filed in opposition to the motions to dismiss took the position "That the plaintiffs do not have to allege facts or damages in their complaint under the Federal Rules." (A. 15.)

> 2d 182, 186 (C. A. 9), cert. denied, 371 U. S. 920, 83 S. Ct. 288, 9 L. Ed. 2d 229. See also Colbert v. Brotherhood of Trainmen, 206 F. 2d 9 (C. A. 9), cert. denied, 346 U. S. 931, 74 S. Ct. 320, 98 L. Ed. 422; Ostrofsky v. United Steelworkers, 171 F. Supp. 782 (D. Md.) aff'd 273 F. 2d 614, cert. denied, 363 U. S. 849, 80 S. Ct. 1628, 4 L. Ed. 2d 1732." (372 F. (2d), p. 835.)

Similarly, the Court of Appeals for the Third Circuit set forth requirements of pleading bad faith or hostile discrimination of the union which plaintiffs here clearly failed to meet. In *Gainey* v. *Brotherhood of Railway & Steamship Clerks*, etc., 313 F. (2d) 318, that Court said:

> ". . . The complaint before us must have more than conclusory statements alleging discrimination. In particular plaintiffs must make a showing that the action or inaction of the statutory representative complained of was motivated by bad faith, for the gravaman of the rule is 'hostile discrimination.' An allegation that certain conduct of the Brotherhood or a condition permitted to exist by it is 'invidious' and 'discriminatory', without a concomitant identification of lack of good faith, will not set forth a claim sufficient to call for the use of the Steele doctrine." (313 F. (2d), p. 323.)

And in the case of *Slagley* v. *Illinois Central Railroad Company*, 397 F. (2d) 546, the Court of Appeals for the Seventh Circuit said:

> "The pertinent allegations of the complaint are that the O. R. C. & B. compelled I. C. to deprive appellant of his seniority, that this action was 'wrongful, unlawful, and unconstitutional,' 'arbitrary and capricious,' and 'constituted wrongful and unlawful discrimination toward plaintiff,' and that the action breached the collective bargaining agreement and violated the Federal and Indiana Constitutions. We find these allegations insufficient to state a claim for breach of the duty of fair representation. They are mere conclusions of law, plainly insufficient under the Federal Rules of Civil Procedures . . . ." (397 F. (2d), p. 552.)

As we have noted, and as the court below conceded, the complaint in the present case alleged nothing more than the bare conclusion that the union's refusal to process plaintiffs' grievances constituted hostile discrimination. The record is silent as to any facts from which bad faith or a discriminatory motive could be inferred. Absent such bad faith or improper motive, it is clear from this Court's decisions and those of other courts of appeals that plaintiffs have not stated a sufficient claim against the union defendants for violation of the duty of fair representation.

(*b*) *Failure to allege exhaustion of administrative remedies.*

The decision below also fails to recognize and properly apply general principles of exhaustion of administrative remedies and arbitration procedures which this court has formulated in numerous decisions in the labor-management field. That these principles have application in a fair

representation case such as this was made clear in the Court's opinion in *Vaca* v. *Sipes, supra.* As the Court stated, " . . . it is settled that the employee *must at least attempt* to exhaust exclusive grievance and arbitration procedures established by the collective bargaining agreement. Republic Steel Corp v. Maddox, 379 U. S. 650, 13 L. Ed. (2d) 580, 85 S. Ct. 164." (386 U. S., pp. 184-185; emphasis supplied.)

In the instant case there was no showing that plaintiffs had attempted to pursue available administrative remedies individually, after the alleged refusal of the union to process their wrongful discharge claims. It was conceded,[4] and recognized by the Court of Appeals (A. 24, 27), that they could have done so.

The decision of the Court of Appeals on the lack of any duty on the part of plaintiffs to attempt to exhaust their administrative remedies is also in conflict with recent decisions of other Courts of Appeals. The Court of Appeals for the Seventh Circuit, in *Slagley* v. *Illinois Central Railroad Company,* 397 F. (2d) 546, after recognizing the statutory right of individual railroad employees to submit their claims to the National Railroad Adjustment Board [5] (as contrasted with contractual arbitration procedures outside the railroad industry where, as in *Vaca* v. *Sipes,* arbitration is not available unless invoked by the union), stated the rule as follows:

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[4] In their brief before the Court of Appeals below plaintiffs stated:

"Appellants could conceivably proceed before the National Railroad Adjustment Board on the wrongful discharge issue, but if and when these claims are rejected, the right to seek redress in a judicial forum is lost because of the statute of limitations."

[5] *Elgin, J. & E. R. Co. v Burley,* 325 U. S. 711, 740.

> "However, we need not decide whether the differences between the statutes render the *Maddox-Vaca* principles inapplicable to minor disputes under the Railway Labor Act. To come within the *Maddox-Vaca* exception to the general exhaustion requirement an employee seeking to enforce a collective bargaining agreement must allege that he has attempted to utilize the available contract grievance procedure and that his attempt has been thwarted by union conduct constituting a breach of the duty of fair representation .... Appellant's complaint is plainly insufficient. It contains no allegation that he attempted to use the contract grievance procedures or file his claim with the Adjustment Board." (397 F. (2d), pp. 551-552).

Similarly applying the requirement of exhaustion of remedies, when available, in a fair representation case, is the decision of the Court of Appeals for the Sixth Circuit *Steen* v. *Local Union No.* 163, *United Auto, A. & A. Imp. Wkrs.*, 373 F. (2d) 519. In that case, as here, plaintiff's claim against his union was that it had refused to initiate a grievance on his behalf. In sustaining a dismissal of the complaint, the court said:

> "Plaintiff communicated with the foreman neither verbally nor in writing. He did contact various officials of the local and international unions, but to allow such activity to serve as a substitute for the contractual grievance procedures would be to 'deprive employer and union of the

> ability to establish a uniform and exclusive method for orderly settlement of employee grievances.' Republic Steel Corp. v. Maddox, supra, 379 U. S. at 653, 85 S. Ct. at 617 . . . ." (373 F. (2d), p. 520.)

While according full force and vitality to the doctrine of exhaustion of remedies with respect to plaintiffs' claim against respondent Railroad Company, the Court of Appeals refused to apply it to their claim against the union defendants, apparently because of the complaint's conclusory allegations of "hostile discrimination." (A. 26-27.) In this connection, the Court of Appeals for the Tenth Circuit, in the recent case of *Transport Wkrs. U. of Amer.* v. *Amer. Airlines, Inc.*, 413 F. (2d) 746 (June 24, 1969), said:

> "The futility of the contractual or administrative remedy must clearly appear beyond mere conclusionary language in a complaint, for otherwise the doctrine of exhaustion would be dissipated by mere form and the door to the courts could be opened by prediction rather than by jurisdictional fact." (412 F. (2d), p. 751.)

The Court of Appeals below also sought to justify its refusal to apply the exhaustion of remedies doctrine to the unfair representation charges against the union defendants on the ground that it "does not involve a dispute between 'an employee or group of employees and a carrier or carriers,' 45 U. S. C. Sec. 153 First (i)," and therefore did not fall within the jurisdiction of the National Railroad Adjustment Board. But in an unfair representation case of this type, based on a union's failure to process a grievance or contract claim, it is the employer's alleged breach of contract upon which the controversy turns. As this Court made clear in *Vaca* v. *Sipes*, 386 U. S. 171, the employee plaintiff

in an unfair representation case must at the outset establish that the contract claim which the union refused to handle was in fact a meritorious one, and any ultimate recovery of damages would probably be attributable primarily, if not entirely, to the employer's breach of contract.

The reasoning of the court below on this point would enable a plaintiff to abrogate the doctrine of exhaustion of remedies by selective choice of defendants. But there is no justification for thus limiting that doctrine to a requirement that the only administrative remedies that must be pursued are those which lie against the party chosen as defendant. Plaintiffs' basic grievance against the Railroad Company was one for which they had a full and complete remedy, and could have been made whole, in a proceeding before the National Railroad Adjustment Board.

II. The Court of Appeals erred in permitting this action to be maintained against petitioners while sustaining its dismissal as to respondent Railroad Company.

In holding that the plaintiffs could maintain an action against the union defendants for damages for violation of the duty of fair representation, but could proceed against the Railroad Company on their wrongful discharge claim only before the National Railroad Adjustment Board, the Court of Appeals ignored this Court's holding in *Vaca* v. *Sipes,* 386 U. S. 171, a leading decision on the fair representation principle. In its opinion the *Vaca* case is not cited, referred to or discussed.

In that case an employee, claiming that he had been wrongfully discharged in violation of the collective bargaining agreement, brought suit against the union claiming that it had breached its duty of fair representation by refusing to process his grievance. The employer was not made a

party to the action, and the plaintiff obtained a judgment of compensatory and punitive damages against the union based on the employer's breach of contract. This Court reversed the judgment, and as one of the grounds for reversal held that damages could not be recovered from the union for the employer's breach of contract. The Court said:

> "... Though the union has violated a statutory duty in failing to press the grievance, it is the employer's unrelated breach of contract which triggered the controversy and which caused this portion of the employee's damages. The employee should have no difficulty recovering these damages from the employer, who cannot, as we have explained, hide behind the union's wrongful failure to act; in fact, the employer may be (and probably should be) joined as a defendant in the fair representation suit, as in *Humphrey* v. *Moore*, supra." (386 U. S., p. 197.)

The decision of the Court of Appeals in the present case stands squarely in conflict with *Vaca* v. *Sipes, supra.* It holds that the plaintiff employees *are* entitled to maintain an action to recover damages solely from the union for "the employer's unrelated breach of contract which triggered the controversy," and that an employer *can* "hide behind the union's wrongful failure to act."

That the complaint here alleged only an "employer's unrelated breach of contract" was recognized by the Court of Appeals when, in its remand order, it permitted plaintiffs to amend their complaint, if they could, to allege complicity between the union defendants and the Railroad Company. Such disposition of the appeal leaves the case in the

anomalous situation where the only way the union can escape the full burden of liability for the employer's breach of contract is for the plaintiff employees to show that the union induced, or conspired to procure, that breach.

This result, and the rationale and holding of the court below, are directly at odds with this Court's decision in *Vaca* v. *Sipes, supra.* As the Court indicated in that portion of the opinion quoted above, the fact that the employer is primarily or totally responsible for plaintiffs' damages makes it essential that the employer be made a party to the action, and the union cannot be made to assume the employer's burden of damages.

Further in clear conflict with the *Vaca* decision is the ruling below to the effect that plaintiffs could proceed separately against the union and the Railroad Company before two different tribunals, the District Court and the National Railroad Adjustment Board. As the Court said:

> "These remedy problems are difficult enough when one tribunal has all parties before it; they are impossible if two independent tribunals, with different procedures, time limitations, and remedial powers, must participate." (386 U. S., p. 188, footnote 12.)

The "impossibility" of these remedy problems is accentuated in the railroad industry by the final and binding, conclusive effect accorded to awards of the National Railroad Adjustment Board. *Gunther* v. *San Diego & A. E. R. Co.*, 382 U. S. 257 (1965). The decision of the court below leaves the plaintiffs free to pursue, separately and simultaneously, a court action against petitioners and an administrative proceeding before the Board against respondent Railroad Company. Would the court consider itself bound by a prior Board determination of the breach of

contract issue? Would the Board feel bound to follow a prior court decision on the same issue, in a case to which the railroad was not a party? How could the two separate tribunals accomplish the allocation of damages which this Court, in *Vaca* v. *Sipes*, has said must be made? One thing seems apparent. A union, faced with a judgment for damages in the unfair representation case, would be confronted with insurmountable difficulties in attempting to recover that portion of the damages attributable to the railroad company, if confronted with a final and binding award of the Board to the effect that the company had not breached its contract. The union would indeed be required to pay the employer's share of the damages, a result condemned by this Court in *Vaca* v. *Sipes*.

III. The decision below would seriously disrupt collective bargaining and the handling of grievances in the railroad industry.

Although categorized as "minor disputes," grievances and contract claims of employees constitute the week-in-week out, year-around business of the collective bargaining process. To avoid interruptions to commerce resulting from strikes over such disputes Congress provided, in the Railway Labor Act (45 U. S. C., Sec. 151 et seq.) for a complete system of compulsory arbitration before the National Railroad Adjustment Board, eliminating the strike as a legitimate means of settling these "minor disputes." *Gunther* v. *San Diego & A. E. R. Co.*, 382 U. S. 257, *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana Railroad Co.*, 353 U. S. 30. The Board's jurisdiction over such disputes is exclusive. (*Slocum* v *Delaware, L. & W. R. Co.*, 339 U. S. 239.)

The effect of the decision below is to open the doors of the courts to litigation over all employee grievances and

contract claims which the union fails or refuses to process, while at the same time leaving the employee free to process the same claim or grievance, simultaneously or consecutively, before the National Railroad Adjustment Board. The court below prescribed no measure of damages or limit upon the recovery which the employees might obtain in their damage action against their union, or in their Adjustment Board proceeding against the Railroad Company. Presumably it contemplated that a full recovery against either or each might be had for whatever damages had been suffered by the employees as a result of the alleged breach of contract by the Railroad Company. And presumably, if the employees should fail to prevail on the merits before one tribunal, they would have a second chance before the other.

On the basis of the holding below, a union can be forced to defend a court action for damages whenever it refuses to process a grievance. As in the instant case, all that must be alleged is that such refusal constituted "hostile discrimination." The disruptive effects of such a rule are aptly described in this Court's opinion in *Vaca* v. *Sipes*, 386 U. S. 171, pp. 191-192. Unions would be compelled either to process all grievances and contract claims of the employees they represent, or to handle none of them, and abandon this large segment of the collective bargaining function to individual handling. Either course would be disastrous, from the point of view of both employer and employees, and the statutory arbitration procedure before the adjustment Board would be so overburdened as to become unworkable.

Similar effects would ensue if, as held below, grievances could be processed twice, before two different tribunals. As the Court of Appeals for the Seventh Circuit said, in

commenting upon this Court's ruling in *Union Pacific Railroad Co.*, v. *Price*, 360 U. S. 601:

> ". . . A contrary holding would make a shambles of the statutory and contractual provisions for the settlement of grievances." (*Stumo* v. *United Air Lines, Inc.*, 382 F. (2d) 780, 786; cert. den. 389 U. S. 1042.)

Finally, the decision below, permitting railroad employees to process breach of contract claims both in the courts and before the National Railroad Adjustment Board, would invite conflicting rulings, both as between different courts throughout the country and as between the Board and the courts. Under the Railway Labor Act collective bargaining agreements have application over the entire system of the carrier, usually traversing numerous judicial districts, and many contracts are national, or industry-wide, in scope. The decision below would critically impair the "desirable degree of uniformity in the interpretation of agreements throughout the nation's railway systems" which this Court recognized in *Slocum* v. *Delaware*, L. & W. R. Co., 339 U. S. 239, 243 (1950).

CONCLUSION

In the foregoing discussion we have shown that the complaint herein failed to state a claim against petitioners for unfair representation, lacking adequate allegations with respect to the necessary bad faith, arbitrary action or hostile discrimination, and with respect to exhaustion of administrative remedies. We have further shown that the Court below erred in permitting the action to be maintained against petitioners, while sustaining its dismissal as to respondent Railroad Company on the basis of jurisdiction in the National Railroad Adjustment Board.

The District Court correctly decided these issues in dismissing the action as to all defendants.

Both courts below correctly held that the action could not be maintained on other grounds asserted in the complaint, i. e., a wrongful discharge action with jurisdiction predicated on diversity of citizenship; an action for violation of the Interstate Commerce Act; and an action for violation of the notice requirements of Section 6 of the Railway Labor Act (45 U. S. C., Sec. 156). Plaintiffs-respondents have not sought review of these rulings.

For the foregoing reasons it is submitted that the judgment of the Court of Appeals should be reversed, and the judgment of the District Court, dismissing the complaint, affirmed.

Respectfully submitted,

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